LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
[illegible] 17 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 293.

JAKE SHERMAN and JENNIE SHERMAN,
Co-partners, trading under the firm name of
Livernois Auto Parts,
Petitioners,

vs.

GOERLICH'S, INC.,
an Ohio corporation, and
IRVING GRAND,
an individual doing business as Grand Sales Company,
jointly, severally and individually,
Respondents.

BRIEF FOR RESPONDENT
In Opposition to the Petition For Writ of Certiorari.

FRED A. SMITH,
7th Floor, Toledo Trust Bldg.,
Toledo 4, Ohio,
Attorney for Respondent,
Goerlich's Inc.

Of Counsel:
CAROLYN J. MCNEILL,
COBOURN, YAGER, SMITH & FALVEY,
7th Floor, Toledo Trust Building,
Toledo, Ohio.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

INDEX.

Citations to Opinions Below ---------- 1

Jurisdiction ---------- 2

The Question Presented for Review ---------- 2

Statement of the Case ---------- 3

Reasons Why the Writ Should Not be Granted ---- 7

A. Reason Number One ---------- 7

B. Reason Number Two ---------- 7

Conclusion ---------- 11

TABLE OF AUTHORITIES CITED.

Cases.

Garelick, et al. v. Goerlich's, Inc., et al., 323 F. 2d 854 (6th Cir. 1963), also referred to herein as "The *Capitol* Case" ----------1, 6, 7, 8, 12

Sherman et al. v. Goerlich's, Inc. et al., 238 F. Supp. 728 (D. C. E. D. Mich., 1963) ---------- 1

Sherman, et al. v. Goerlich's, Inc. et al., 341 F. 2d 988 (6th Cir. 1965) ---------- 1

Rules.

Rule 23, Rules of the Supreme Court of the United States ---------- 3

Rule 56, Federal Rules of Civil Procedure ---------- 11

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 293.

JAKE SHERMAN and JENNIE SHERMAN,
Co-partners, trading under the firm name of
Livernois Auto Parts,
Petitioners,

vs.

GOERLICH'S, INC.,
an Ohio corporation, and
IRVING GRAND,
an individual doing business as Grand Sales Company,
jointly, severally and individually,
Respondents.

BRIEF FOR RESPONDENT
In Opposition to the Petition For Writ of Certiorari.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court granting defendants' motions for summary judgment is reported at 238 F. Supp. 728. The per curiam opinion by the Court of Appeals affirming that judgment is reported at 341 F. 2d 988. The related opinion by the Court of Appeals, *Garelick, et al. vs. Goerlich's, Inc., et al.*, is reported at 323 F. 2d 854 (6th Cir. 1963).

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 9, 1965. No petition for rehearing was filed. The jurisdiction of this Court is invoked by Petitioners under 28 U. S. C. Section 1254(1). An order extending the time within which to petition for certiorari to and including July 8, 1965 was granted in this case.

THE QUESTION PRESENTED FOR REVIEW.

The question involved in this case is:

Whether a former customer's asserted claims against a partnership (arising from being cut off by the partnership from its products, allegedly in violation of the antitrust laws) are barred as claims against Respondent, Goerlich's, Inc. (who never sold such customer anything), by the applicable *four-year* statute of limitations, when the undisputed evidence shows that Petitioners were discontinued as a customer of the partnership prior to March 1, 1955, and this litigation was not instituted until April 26, 1960, more than *five years* after Petitioners were discontinued as a customer of the partnership.

STATEMENT OF THE CASE.

Petitioners' Statement, six sentences in length, is insufficient in that it is limited to the nature of the action and a partial quotation from the District Court opinion. It omits any reference to "a concise statement of the case containing the facts material to the consideration of the questions presented" required by Rule 23 of this Court.

The insufficiencies in Petitioner's Statement are apparent. The bar of the statute of limitations in this case is based upon facts incontrovertibly established by extensive discovery proceedings (including some 464 pages of depositions of Petitioners and others, Answers to Interrogatories, Admissions of Facts, Stipulations and Orders relating to the records of approximately seventy-five of this Respondent's customers in the Detroit area, and Admission of Genuineness of some one hundred forty-six documents relating to the records of sixteen of Respondent's customers in the Detroit area).

Prior to March 1, 1955, Petitioners, hereinafter referred to as "Livernois," were customers of Goerlich's, a partnership. Goerlich's never had any form of contract with Livernois, either written or oral, except for Livernois' orders placed from time to time for exhaust system parts. Livernois, a wholesaler of automotive parts, was one of more than thirty customers of Goerlich's in the Detroit area of Wayne, McComb and Oakland Counties, Michigan. On or about the year 1954, Livernois decided to engage principally in the retail business of installing exhaust system parts rather than continuing primarily as a wholesaler. Goerlich's, the partnership, had a policy of not selling directly to installers. The last order from Livernois accepted by the partnership was dated January 22, 1955, with shipment completed on February 18, 1955. Since such time the partnership has not made any sales to

Livernois. This Respondent, Goerlich's, Inc. (which on August 31, 1955, purchased from the partnership the latter's business and goodwill in merchandising automotive mufflers and exhaust system parts), *has never sold anything* to Livernois.

Continuously, since February of 1955, Livernois has purchased Goerlich's exhaust system parts from Goerlich's or Goerlich's, Inc. distributors (including Respondent Grand) in the Detroit area, and has purchased from distributors of competitors or directly from competitors of the partnership, or Goerlich's, Inc. It is conceded and the evidence clearly shows that Livernois has always been able to purchase any exhaust parts that it desired from a number of Goerlich's distributors.

Livernois never purchased anything from this Respondent. The partnership and distributors handling Goerlich's products were Livernois' principal source of supply in 1954 and 1955. In the four-year period prior to the filing of this suit, i.e., 1956-1959 inclusive, Livernois obtained approximately 70% of its exhaust system supplies from others, approximately 30% from Goerlich's, Inc.'s distributors, and nothing from Goerlich's, Inc.[1]

---

[1] According to certain records furnished by Livernois (Def.'s Deposition Exhibit 24A), over the six year period from 1954 to 1959 inclusive, Livernois' annual purchases of exhaust system parts from Goerlich's, the partnership, from distributors handling Goerlich's products and from others, were as follows:

	Goerlich's, the partnership	Goerlich Distributors (A)	Others
1954	$12,750.45	$ 1,664.23	$ –0–
1955	5,452.56	9,656.05	3,062.31
1956	–0–	6,122.02	23,751.97
1957	–0–	10,849.55	5,167.42
1958	–0–	2,920.50	5,653.77
1959	–0–	4,538.00	18,560.75
Totals (6 yrs.)	$18,203.01	(6 yrs.) $35,750.35 (B)	$56,196.22

(Continued on following page)

Goerlich's, Inc.'s distributors continued to sell Livernois and do to this day on the basis they sell everyone else.

On April 26, 1960, more than five years after Livernois ceased being a customer of the partnership, this suit was filed against Goerlich's, Inc., and one of its present customers in the Detroit area. Thereafter Goerlich's, Inc. took the deposition of the individual Petitioners and the latter in turn took the deposition of Respondent Grand and another customer.

To expedite Livernois' discovery, a Stipulation and Order was entered which provided that Goerlich's, Inc. would make available to counsel for Livernois their files with respect to all of their customers in the Detroit area of Wayne, McComb and Oakland Counties, Michigan, but such information was to be kept confidential by such counsel and used only for purposes of this case. Pursuant thereto counsel for Livernois spent several days or parts of days in Toledo checking over Goerlich's files of approximately seventy-five customers or former customers in the Detroit area. The number of Detroit area customers served annually was approximately thirty to thirty-five, but due to changes from year to year, aggregated a total of approximately seventy-five customers. Livernois also served certain interrogatories which were answered, as well as requests for admissions of facts which were answered and requests for the admissions of genuineness of some one hundred forty-six documents relating to sixteen customers of Goerlich's, Inc. or of the partnership in the Detroit area.

(Continued from preceding page)

(A) Grand Schaefer Auto Parts
Grand Sales
Dox Automotive Supply, Inc.
Capitol Automotive Parts and Accessories
Noble Sales Company, and
Progressive Auto Supply

(B) Including $3,041.18 sold by Respondent Grand over the period 1955 to 1959 inclusive.

In June, 1963, counsel for Livernois stated he had completed discovery proceedings and was granted leave to and did file an Amended Complaint. Thereafter, in June of 1963, Goerlich's, Inc., filed an Answer to the Amended Complaint, setting forth as a second defense that the claims were barred by the four-year statute of limitations, and filed a Motion for Summary Judgment based on such ground.

In a hearing on July 15, 1963, the district judge stated that he would defer ruling until the *Capitol* case (*Garelick, et al. vs. Goerlich's, Inc., et al.*, 323 F. 2d 854) was decided by the Court of Appeals, and requested that counsel for the parties join in having that appeal advanced for hearing.

A joint motion to advance the *Capitol* case was granted. The *Capitol* case was argued in October of 1963, and the judgment of the Court below was affirmed by the Court of Appeals on October 30, 1963, *Garelick, et al. vs. Goerlich's, Inc., et al., supra*. Thereafter, the district judge in this case rendered his opinion granting Goerlich's, Inc.'s Motion for Summary Judgment, stating in part:

> "This case is controlled by the recent case of *Garelick et al. v. Goerlich's, Inc.* (6th Cir. 1963), 323 F. 2d 854, hereinafter referred to as the *Capitol* case." (R. 24a.)

An order entering such a judgment was entered on December 27, 1963, from which order Livernois appealed. The Court of Appeals for the Sixth Circuit affirmed (341 F. 2d 988) on February 9, 1965.

Petitioners have engaged new counsel to represent them in this Court. Their former attorney for this case, who also represented the plaintiffs in the *Capitol* case, is not noted as "of counsel" on the Petition for Writ of Certiorari.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

(A) REASON NUMBER ONE.

As previously stated, the decision of the District Court below was deferred pending the disposition by the Court of Appeals of the *Capitol* case. When the district judge suggested that counsel for the respective parties herein file a joint Motion to Advance the *Capitol* case for hearing as a guide for the disposition of this case, the Court inquired of counsel for Livernois if he would join in such a motion, and counsel replied: "I think it is a wonderful idea, Your Honor."

In spite of joining the Motion to Advance the *Capitol* case and expressing the opinion that it was "a wonderful idea," counsel for Livernois claimed in his brief and argument to the Court of Appeals that the *Capitol* case has nothing to do with the pending case. Equally as remarkable is the fact that in the Court of Appeals the Livernois' brief did not cite or discuss a single case (other than the *Capitol* case, which was claimed to be inapplicable) that so much as discussed, mentioned, or even referred to the statute of limitations. Now, in the Petition before this Court, Livernois cites only one case of the five cases other than *Capitol* which were cited in its brief to the Court of Appeals.

(B) REASON NUMBER TWO.

The decision by the Court of Appeals is fully supported by the facts.

Petitioners have abandoned claims originally asserted in their pleadings and refer now only to paragraphs 20 and 21 of their Complaint (R. 3a) and comparable paragraphs 19 and 20 of their Amended Complaint (R. 20a). The first claim relied on is that since 1955 Goerlich's "has refused

to accept plaintiffs' orders for motor vehicle exhaust systems." In the *Capitol* case, the Court of Appeals held that that does not and cannot toll the statute of limitations.

There is absolutely no evidence in this case that Goerlich's distributors were "ferreted out" or "cut off" for dealing with Livernois. To this date, Goerlich's, Inc.'s distributors (including Respondent Grand) have continued to do business with Livernois. (See footnote 1, page 4.)

Livernois' only complaint is that Goerlich's, Inc. refuses to indirectly sell Livernois through the subterfuge of drop shipments direct to Livernois on orders sent in by distributors, when the latter do not warehouse the merchandise or render any normal wholesale services in connection with such sales. Thus, Petitioner, Jennie Sherman, in her deposition testified:

"* * * Can you not go down and get all the mufflers you want from any distributor of Goerlich at the price they sell everybody else?

A. Sure, which is about 26 per cent above the factory cost.

Q. And that is what they sell everybody else in town, isn't it?

A. I suppose.

Q. And you want a price, as I understand, different from the rest of the people in town. You want a better price?

A. I want the same price I have been getting when Goerlich started to sell me.

Q. Although you are doing a different business? When Goerlich started to sell you, you did not install them; you were a distributor.

A. Yes.

Q. You have changed your business and you want a price better than all the rest of the people in town; is that correct?

A. Yes * * *." (R. 14a and 15a.)

"Q. What price did you want this drop-shipped to you for? What did you tell Dox?

A. Five per cent of his cost, and if it was a seven thousand dollar deal or eight thousand dollar deal, he would still make a nice profit.

Q. Isn't it true you went in and asked Mr. Dox to sell you a carload at five per cent above his cost and have it shipped direct to you?

A. That's right, and we pay all the expenses. That's all he would get, is a clear check of the difference.

Q. Drop-shipped and charge you five per cent? That was what you wanted him to do?

A. That's right." (R. 11a and 12a.)

Needless to say, no distributor could lawfully give Livernois a preferential price or service not offered to other customers; nor could Goerlich's, Inc. offer a special price or service to Livernois or make a sale to them conditioned on a "payoff" or "kickback" to some distributor. Even if it were legal, Goerlich's, Inc., was certainly not required to do indirectly what the Court of Appeals in the *Capitol* case held that it was not obligated to do directly.

The District Court, in granting the motion for summary judgment, said:

"The difficulty with plaintiffs' theory against Goerlich's in this case is precisely that of the *Capitol* plaintiffs against the same distributor, namely (in the words of District Judge Kaess in *Capitol*), that 'Whatever injury plaintiffs may have suffered in the recent years results from acts done in 1956 [herein 1955], not from acts done in 1959 and 1961.' The gravamen of the present complaint is the conspiratorial cut-off of Goerlich's products. It was prior to March 1, 1955, that Goerlich's, the partnership, refused to accept plaintiffs' orders. Thus any cause of action these plaintiffs may have had as a result of being discontinued as a customer by the partnership in 1955 could

have been the basis of litigation instituted against the partnership in March of 1955 or at any time within four years thereafter. It is clear from the *Capitol* case, as well as others cited therein, that a civil treble damage case under the anti-trust laws accrues at the time of, and the statute of limitations begins to run from, the commission of the overt act alleged to have caused damage to the plaintiffs. Here it was the cut-off of supplies in 1955. A complaint filed in 1960, amended in 1963, comes too late. Any other holding as to the effect of acts subsequent thereto by way of making good the effectiveness of the cut-off 'would effectively destroy the statute of limitations as a statute of peace.' *Crummer Co. v. duPont* (5th Cir. 1955), 223 F. 2d 238, 248, cert. den. 350 U. S. 848, cited in *Capitol, supra.*" (R. 27a.) (238 F. Supp. 730.)

The Court of Appeals in its opinion stated (341 F. 2d 988) "We find no facts pled by plaintiff which serve to avoid the policy limitation imposed by § 15b." As the District Court stated (and as counsel for Livernois agreed before the District Court when he joined in a motion to advance that cause for hearing):

"This court agrees with the present defendants that the case at bar is in all material aspects identical with the *Capitol* case. Plaintiffs in *Capitol* were represented by the same counsel as in the case before the court. Goerlich's, Inc., appears in both cases as a defendant. As in *Capitol,* the amended complaint in the present case charges a conspiracy by the defendants, resulting in an unreasonable restraint of trade in violation of Section 1 of the Sherman Anti-Trust Act, *supra.* In the motion presently before the court, as in *Capitol,* the defense is based upon the four year statute of limitations, *supra.* In this case, also, as in *Capitol,* there was a notification, given more than four years before suit was commenced, by Goerlich's (then a partnership) that, unless plaintiffs discontinued cer-

tain installation practices, they would be cut off from their supply of Goerlich products. It is not controverted that since February of 1955 Goerlich's has refused to accept present plaintiffs' orders for motor vehicle exhaust systems." (R. 25a.) (238 F. Supp. 729.)

The Court of Appeals agreed, saying:

"In all material respects this case is a companion case to Garelick v. Goerlich's, Inc., 323 F. 2d 854 (C. A. 6, 1963), and, as the District Judge held, is controlled by it." (341 F. 2d, at p. 988.)

CONCLUSION.

As stated *supra*, the question presented by Petitioners is not the question involved in this case. When a motion for summary judgment is made, Rule 56 of the Federal Rules of Civil Procedure makes is clear that the adverse party must show a *genuine* issue for trial, in order to defeat such a motion. No genuine issue was presented to the Courts below by Petitioners after the extensive pretrial discovery which occurred.

The question for decision here is:

Whether a former customer's asserted claims against a partnership (arising from being cut off by the partnership from its products, allegedly in violation of the antitrust laws) are barred as claims against Respondent, Goerlich's, Inc. (who never sold such customer anything) by the applicable *four-year* statute of limitations, when the undisputed evidence shows that Petitioners were discontinued as a customer of the partnership prior to March 1, 1955, and this litigation was not instituted until April 26, 1960, more than *five years* after Petitioners were discontinued as a customer of the partnership.

The lower courts followed the decision of the Sixth Circuit in the *Capitol* case and answered that question "Yes". The judgments below are supported by *Capitol* and by the other authorities cited and discussed in the opinions below and in the *Capitol* case.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRED A. SMITH,
Attorney for Respondent, Goerlich's, Inc.

Of Counsel:

CAROLYN J. McNEILL,
COBOURN, YAGER, SMITH & FALVEY,
7th Floor, Toledo Trust Building,
Toledo, Ohio.